In the

Supreme Court of the United States

JOSEPH EVERETT BROWN and
THOMAS DEAN SMITH,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 71-6193

Washington, D. C.
December 7, 1972

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JOSEPH EVERETT BROWN and THOMAS DEAN SMITH, Appellants,	:	
v.	:	No. 71-6153
UNITED STATES OF AMERICA, Appellee.	:	

Washington, D. C.,

Thursday, December 7, 1972.

The above-entitled matter came on for argument at 1:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LOWELL W. LUNDY, ESQ., P.O. Box 380, Barbourville, Kentucky, 40906; for the Appellants.

M. L. EVANS, ESQ., for the Appellee.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in 71-6193, Brown against the United States.

Mr. Lundy.

ORAL ARGUMENT OF LOWELL W. LUNDY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LUNDY: Mr. Chief Justice, and may it please the Court:

This case, I think, factually, if I may state it briefly, presents a simple question of fact in that the crime charged in this case involved a situation where two men were arrested in Cincinnati, Ohio, with some alleged stolen goods which was to be shipped in interstate commerce, taken across the Ohio River into Kentucky.

The next day, in Manchester, Kentucky, a city police judge in Manchester issued a search warrant for State and local officers to go into a store which belonged to Mr. Knuckles and search for stolen property.

The search warrant was signed in blank by the judge. The affidavit was signed in blank by the judge, and the District Court held that the search warrant was not worth the paper that it was written on, and he quashed the search warrant.

However, the officers, I think, being unaware of that, or whether they were unaware of it or not, they went

ahead and searched for two days in this man's store, and took a large quantity of merchandise.

MR. CHIEF JUSTICE BURGER: It was quite an undertaking, wasn't it?

MR. LUNDY: Two big truckloads. It went on all Saturday afternoon and all day Sunday.

The Court suppressed from motion all the evidence, but only as to the owner of the store. The Court held that the two men who were arrested in Cincinnati did not have standing to suppress the evidence.

The case was tried, and, of course, all the evidence that was seized in the store was admitted in evidence against the two men who are petitioners in this case. They were indicted.

Q How soon after the arrest -- they were arrested with the trucks and with a lot of this merchandise in their possession -- how soon after --

MR. LUNDY: I think it was the next day.

Q Was the warrant obtained subsequent to the time they arrested them in possession of the goods?

MR. LUNDY: Yes, Your Honor. After the goods were gotten in Cincinnati, word was gotten down to Manchester, Kentucky, and one of the employees of the store -- or the merchandising company from which the goods were taken -- he came to Manchester the next day, as I understand it, and he got

the warrant from the city judge.

Now, these men were indicted, together with Clinton Knuckles who is not here, in the first count charging them with a conspiracy to move these goods in interstate commerce.

They were also charged, in the second count, of simply transporting goods in interstate commerce.

The third count involved the other defendant who is not here.

Now, the case was appealed to 6th Circuit and the 6th Circuit held, among other things, that a harmless error had been committed because the rulings of this Court in Bruton had been violated, and they upheld the District Court's ruling that these men did not have standing to suppress this evidence.

Now, factually, that's the case that we are concerned with here today.

Now, if I may, I would like to address myself to the question of these men's standing to suppress this evidence, first.

The Court will, of course, be aware that they were indicted on a conspiracy charge.

Now, the goods that were seized in Kentucky to prove the conspiracy could be used to prove the conspiracy against these petitioners Smith and Brown, but it could not be used to prove the same conspiracy against the co-conspirator and defendant, Clinton Knuckles.

You have here one conspiracy which is charged against three men, and under the law of conspiracy, certainly any statement or act done by any co-conspirator during the time of the conspiracy, or during the life of the conspiracy, is chargeable to all the conspirators. Any deed, any act or any word spoken by a co-conspirator it is charged to the other man. It is his act, too. It's his statement, too.

Q 6th Circuit thought that some of these errors were harmless because these men were caught with the truck and in possession of large amount of stolen goods, and nothing could have altered the result, is that about right?

MR. LUNDY: I don't think so, Your Honor, and if you will permit me to I will explain why I don't think so.

Q You concede that's a pretty strong case against them?

MR. LUNDY: They had a pretty strong case against them for stealing out of the warehouse in Cincinnati.

If all of this stuff that was taken out of the store was not used against them, I think they could not have proven a Federal case against them, nor could they have proven a conspiracy against them.

Now, I say that for this reason. At the trial of the case, the Court instructed the jury that they must have found these defendants guilty of having committed the third overt act charged in the indictment in order to get the case into

Kentucky.

One overt act, according to the trial Court, had to have been committed in Kentucky. Otherwise, the Eastern District in Kentucky would have had no venue over the case. There would have been improper venue.

Now, that overt act charged that these men delivered stolen merchandise which they had stolen in Cincinnati and taken to Manchester, Kentucky.

Now, the Court instructed the jury to that effect, that if they didn't find them guilty of committing that one overt act, then there would have been no business of being in the United States District Court.

Now, without all this merchandise that was gotten out of the store down there in Manchester, Kentucky, they couldn't have proven that, and they wouldn't have had venue and they wouldn't have proved any interstate transportation. They may have got them for stealing in the State of Ohio, but they wouldn't have had them for any interstate violation.

So, from that point of view, I don't think it was a harmless error. I think that -- I look at a harmless error in this manner. If you suppress the evidence and take it out of it, you ought to have a chance to beat the case. You ought to have a chance to win the case.

Now, if you leave it in there would you have any chance to win or wouldn't you. If you leave it in there,

certainly you wouldn't have, but if you take it out, the Government doesn't have much of a case.

Q Would the exclusionary rule apply when it is the Government's attempt to prove venue as opposed to proving elements of the offense itself?

MR. LUNDY: Well, I don't know, Your Honor. I wouldn't think it would make any difference, really. If the evidence is excluded, it is excluded probably for all purposes. If you couldn't admit the evidence in the trial itself which the Government would have to do, then they wouldn't have proven their venue.

So, if you suppress it, you suppress it for all purposes.

Now, I am sure that this Court is aware that this Court has rendered decisions in cases which touch upon this point, certainly in the case of Jones. v. United States and Simmons v. United States and Alderman v. United States, in which the rule has been established that a man doesn't have to come in and claim possession of something in order to have standing to suppress it. If he is either around the premises or has some possessory interest in it, why he has standing.

Now, I think that in the case which is almost precisely in point with the facts of this case is a decision that was rendered in July, 1971, that same out of 2nd Circuit, United States v. Price.

The facts in that case were very similar to the ones in this case, and there was a situation where some fellows stole a bunch of TV sets and they took them and hid them in a warehouse some place.

The warehouse was not in the possession of, nor was the defendant present when the search was made in the warehouse, and the 2nd Circuit came to the conclusion that the man had standing to suppress the evidence and in their opinion they remanded the case for a hearing on that point in order that he may establish it.

Now, the 6th Circuit, of course, in this very case here -- and, incidentally, in the Price case it involved a conspiracy also.

Now, the 6th Circuit, of course, has taken a contrary position. They say that my men have no standing to suppress this evidence because they weren't there and it wasn't a possessory crime, and they had no standing to suppress it.

Now, certainly the law was not complied with in this case. The judge of the police court of Manchester, Kentucky, just signed his name to a piece of paper. He told the County Attorney -- and we can assume that maybe the city judge in a small town doesn't know any better, being a layman -- he told the county attorney, he said, "You can go over and just fill it in. I've got to take my wife to the hospital."

And I think the man signed another piece of paper for

the affidavit and told the county attorney to go over and fill it in. And the county attorney filled in the affidavit for the search warrant, and he talked to the defendant -- the proposed defendant -- and they didn't have enough detail in it, so they tore that up and did another one. And then they gave this to the officers and the officers went down there and searched.

Q There is no issue about that being a wholly invalid warrant, Mr. Lundy. There is no issue about that, is there?

MR. LUNDY: The Assistant United States Attorney admitted it wasn't worth the paper it was written on --

Q And, as I understand it, the Government here in this Court proceeds on the premise that that was an invalid warrant.

MR. LUNDY: That's true, but I would like to make this, what I think is a distinction. We are frequently reminded that because the constable bungles the felon goes free. This isn't that case. This isn't the case where some law officers went in and engaged in illegal search and seizure, because they were zealous, they disregarded the rights of the people, and they may have acted out of ignorance.

This is a case where the error was committed by a judicial officer and by prosecuting attorney who should have known better.

Q Was Knuckles ever prosecuted?

MR. LUNDY: Yes, he's been tried twice, so far.

Q He wasn't a co-defendant here, was he?

MR. LUNDY: He was a co-defendant here, but this case was sent, as to him. And that's another point I want to talk about. The Court went into severance as to Knuckles because all the evidence that was seized could not be admitted against him, but it could be admitted against these other two fellows over here.

Of course, I am sure the Court reasoned that he couldn't just take that all of a sudden as being introduced in evidence and then admonish the jury, "You consider this against Smith and Brown but you forget about it over here as far as Knuckles is concerned.

I don't mean to mislead the Court. Knuckles was not tried with these petitioners. He has been tried subsequently under a succeeding indictment that the Government has tried to make improvements on.

Q What has been the result of the Knuckles trials? Are they hung juries in both cases?

MR. LUNDY: The first case was a hung jury and the second case was a mistrial.

And the second case was under indictment number 2 and the third case was under indictment number 3, and the succeeding indictments had two more co-conspirators named in those cases.

But it is very difficult for me to see how -- if you are going to prove one conspiracy, you can use different quantities or qualities of evidence to prove it against different people.

If we three gentlemen sitting here conspire to commit a crime, it bothers me to think that they can use more evidence against me than they can against these two fellows.

You ought to be able to take the same evidence to convict all three of us and you ought to let the same quality of evidence be used as far as all of us are concerned.

Now, this crime that they have these fellows charged with here is not, I would say, a possessory crime per se, like you had in the case where the man had narcotics in the Byrd case -- the Jones case.

But the United States couldn't prove this case unless it showed that sometimes these men had all this two truckloads of stuff in their possession.

So it had to prove possession at some point to prove the crime.

Personally, I don't like conspiracies -- I mean as a crime they are the devil to defend. It doesn't take much to prove one. The Government has all kinds of evidentiary advantages on you. They just have to prove the conspiracy that we three fellows sat and talked about violating the law and plotted a little bit, then prove that I made one overt act.

If I made one overt act, then they've got us all. Anything he says two days and 50 miles away can be used against me, too.

The law is very plain. This Court has spoken on several occasions to the effect that a partnership -- a conspiracy is a partnership in crime, that acts and the statements of a co-conspirator made in the course of the conspiracy are admissible against all conspirators who were conspirators at that time.

In the trial of this case, the Court so instructed the jury in effect.

Q (inaudible)

MR. LUNDY: Well, I am arguing about this idea of agency and conspiracy to try to reason my way through and if I can help the Court to reason its way through --

Q The only statements at issue here were made after the conspiracy --

MR. LUNDY: That's true. I am not talking about that --

Q Isn't that the only issue here?

MR. LUNDY: I am talking about the Fourth Amendment issue.

Q As I understood your point, at least in your brief, was that what is sauce for the goose should be sauce for the gander, and if the Government can take all the advantage of this conspiracy theory then you ought to have some of the

advantage of it in holding that Knuckles was a member of the partnership and your agent. Isn't that it?

MR. LUNDY: That's precisely it.

Q There are no prearrest statements at issue here?

MR. LUNDY: No, sir.

Q Okay.

MR. LUNDY: All the statements were made afterwards.

Now, the Court instructed the jury -- I am referring to page 226 of the Appendix, where the Court very plainly -- and it is in quotes, "A conspiracy is a kind of a partnership in criminal purposes in which each member becomes the agent of every other member."

Now, if the Government can use that, I am entitled to the same thing that they are entitled to use against my man.

Now, if Clinton Kunckles had possession and all of this merchandise in his store was seized under a no-account search warrant, then my men are partners, they are agents. They have joint possession of it. It is a joint constructive possession. It certainly very logically follows the law on conspiracies.

Q Did they have joint possession of the store, do you think?

MR. LUNDY: No, sir, they did not. They were in Cincinnati and he was in Manchester, Kentucky.

But if the law believes a fiction to convict a man, use that same fiction to let him go.

Q There isn't very much fiction involved in the concept of criminal conspiracy, is there? What is the fiction of criminal conspiracy when they have established that people have done certain things in concert?

It may be a fiction to call that a partnership, and anybody who does, I am sure, puts it in quotation marks, either actually or figuratively.

MR. LUNDY: I think what the law is trying to do is try to take the concept of partnership law and apply it over here to criminal situation.

Q What case did we do that in?

MR. LUNDY: That's been done in several cases, Your Honor. I think that --

Q Was anything ever said about partnership law, or was the term partnership in these cases used in a colloquial sense, a shorthand for saying that in their criminal conduct they acted like partners in the sense that it was a joint venture.

MR. LUNDY: Well, it was used in that sense, Your Honor, but certainly --

Q You now want to draw in all the train under the law of partnership --

MR. LUNDY: I think that the Government is allowed to do that when they prosecute the case.

Q You don't really say that the Government invoked

partnership law in the prosecution?

MR. LUNDY: If this man over here does something 10 miles away from me, why I am charged with his act. If he says something 10 miles away from me, I am charged with his statement. In the conspiracy case, if he is my partner and we are running a filling station or selling cattle, or whatever, whatever he does, I am bound by it.

I think it is a bad fiction. I dislike it myself. I think that it is too harsh a law. I think the law of conspiracy -- if I may refer to the Krulewitch case and the concurring opinion of Justice Jackson in that case -- conspiracy has a bad history. It derived from the star chamber. It has all kinds of connotations of intrigue and, you know, assassinating kings and gunpowder props and things of that nature.

Q On this record, there was quite a bit of intrigue here, wasn't there?

MR. LUNDY: I don't think anything of that nature, Your Honor. The only thing it involved, as far as I could see, these two fellows were stealing and they got caught, and they tried to make a conspiracy out of that. I don't think that merits a conspiracy.

The Government used it on fellows out making moonshine whiskey, when one of them buys it from another. Another man hauls them some cornmeal up, or something; they make a

conspiracy out of that. That's a piddling crime. It is used for too many trivial things.

If I might refer to the Simmons case, which this Court decided a few years ago, and I quote from that case. It says, "This Court has never considered squarely the question whether defendants charged with nonpossessory crimes, like Garrett, are entitled to be relieved of their dilemma entirely."

And I think that -- like Justice Stewart says -- I think what is sauce for the goose is sauce for the gander.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Evans.

ORAL ARGUMENT OF M. L. EVANS, ESQ.,

ON BEHALF OF THE APPELLEE

MR. EVANS: Mr. Chief Justice, and may it please the Court:

This case presents principally two questions relating to the application of the automatic standing rule.

First, whether it applies where the possession charged is of stolen property. Second, whether it applies where the possession charged is possession that was at a time other than a time when the search and seizure took place.

In our view, the answer to both of these questions is no.

The case is similar, in some respects, to the Combs case which was here last term and which the Court disposed of

without deciding the automatic standing issue.

On the day that Combs was decided, certiorari was granted here.

Mr. Lundy has detailed the facts. In essence, petitioners Brown and Smith were engaged in stealing merchandise from the Central Jobbing Company in Cincinnati. They transported the merchandise across State lines to Kentucky where they sold it to Clinton Knuckles, the owner of the Knuckles Dollar Store.

Two months later, after the final act of interstate transportation, a defective search warrant was issued and a search was conducted of Knuckles store.

The petitioners were charged with interstate transportation of stolen merchandise and with conspiracy to commit the substantive offense. And on a motion to suppress they sought to exclude the evidence that was seized from the Knuckles store.

The Court below rejected these contentions on the ground that the petitioners lack standing to make them.

In our view, it is clear on these facts that the petitioners have no standing under the traditional standing rule. That rule requires a showing of an interest either in the premises that were searched or in the property that was seized.

The petitioners here have no interest in the premises that were searched. It was Knuckles' store. They

have never asserted that they had any interest in the premises, and they were not present at the time the search was conducted. In fact, they were in custody in Ohio, having been arrested the previous day.

Nor do they have an interest in the property that was seized. There is no proprietary interest because the property was stolen. It didn't belong to them. There is no possessory interest because they parted with the possession two months earlier.

In other words, their Fourth Amendment rights were not implicated by this search and seizure.

To the extent that Mr. Lundy has on argument here attacked the traditional standing rule, I believe that as recently as Alderman it has been upheld and definitively. The Fourth Amendment rights are not assertable vicariously. And their personal rights and the exclusionary rule is limited to circumstances where one can allege that he has been a victim of an unlawful search rather than one who is aggrieved solely by introduction of evidence that was so seized.

Q What about a traditional, conventional kind of partnership. Let's say a law partnership, and if something is wrongfully seized can any one of the partners complain about it under the Fourth Amendment? From the safe of a partnership, say, or --

MR. EVANS: The question is a hard one to pose, I

think, because in most instances the situation is such that the partner has an interest in the premises that were searched.

It is hard to even imagine a situation of a partnership property circumstance where there hasn't been some invasion of the premises searched. But beyond that --

Q Well, let's say -- I am just kind of thinking out loud. I agree that in most law offices they would have a lease in an office building and every partner would have an interest in that piece of real estate.

But let's say that one of the partners takes something belonging to the partnership home with him to his home. Does every partner then have a Fourth Amendment complaint if that other partner's home is wrongfully entered and the property seized?

MR. EVANS: I think it is a close question. I think it can be argued on either side.

Q Because here, rightly or wrongly, the trial judge did tell the jury that this was a partnership. He used that word, didn't he? Page 226 of the record.

MR. EVANS: When we are dealing with Fourth Amendment questions, I don't think that the partnership -- in the context of this case, anyway -- I don't think the partnership idea really applies. But even if these concepts --

Q I wondered if you -- the way you began your argument, you absolutely ignored the argument of your opponent. You have

talked about this case as though it is just another Fourth Amendment case. You haven't paid any attention to his argument that this is a conspiracy case and, therefore, it is different, and that the trial judge didn't have the view, at least, that this was a partnership. That's the word he used.

MR. EVANS: My answer to the argument is there are several problems with it. In the first instance, even if we assume that partnership concepts are appropriate in their traditional common law sense, the traditional common law rule is there cannot be a partnership for an illegal purpose.

But even putting that aside, the partnership is, by Mr. Lundy's assertions, coincident with the conspiracy. The conspiracy ended, by definition, the day before the search was made. They were arrested, they had already given their confessions, their statements, at the time the search was made.

But in any event, even if we go all the way and say that on the basis of this constructive possession theory they had possession at the time the search was made, it is our view that the possessory interest in stolen property is not an interest that the Fourth Amendment is designed to protect.

Q So you really would argue then that if you run across a fellow with a stolen car that under any circumstances you can search the car because it is stolen? Just because it is stolen and not getting into any other basis for the search.

MR. EVANS: I think that a stolen car is a slightly different situation --

Q It is property interest.

MR. EVANS: Right, there is no property interest. And I would argue, I think, that such a search could be made. The difference is that in some respects a car is like -- you can enclose things within it. It is a large place almost like a house. Even though it is not, you are in a sense a trespasser on that car. And I would argue that the car may be searched regardless --

Q Just because it is stolen.

MR. EVANS: Right. Now, there is a consideration that might lead to a different result.

Q There are no cases around like that, are there?

MR. EVANS: Not that I know of. But there is a consideration that could be brought to bear on the other side of that issue and that is that since we are concerned with the deterent fact of the Fourth Amendment in these standing questions, it could be that where you have a stolen car and it is clear that people can search -- that police can search stolen cars without anything more -- it might there have some impact on the deterent effect of the Fourth Amendment.

Q Does it make any difference in this case whether there is standing or not? Do you really care? As long as there is no interest in the store -- and it is conceded that

there isn't -- the officers were validly where they were, right?

MR. EVANS: Well, if there is standing in the petitioners to assert the Fourth Amendment, as claimed, I believe --

Q But not with respect to the store. Let's assume they have standing to assert an interest in the goods, an illegal seizure of the goods. They may have standing to assert it, but won't they automatically lose?

MR. EVANS: Well, I think not because --

Q It is stolen property, isn't it?

MR. EVANS: It is stolen property.

Q The officers have probable cause to seize it, don't they? They are legally where they are when they see it.

MR. EVANS: They are not legally where they are because they entered --

Q No, we just put aside the fact that they did not illegally enter the store,with respect to this defendant.

MR. EVANS: yes, that's right.

Q I gathered your colleague on the other side conceded that he wasn't arguing that the partnership in crime gave his clients any interest in the store, that they could assert under the Fourth Amendment.

MR. EVANS: Right. And in our view, nor did they have any interest in the property.

Q Well, even if they did they would lose --

MR. EVANS: I suppose that is right, yes.

Because the petitioners here lack the traditional -- standing under the traditional rule -- they sought to invoke the automatic rule that was established by the Jones case.

The automatic standing rule is a narrow exception to the traditional rule.

In Jones, narcotics were seized from a -- during a search and seizure of an apartment belonging to a friend of the defendant. While the defendant was on the premises, he was charged with various narcotics offenses which, because of statutory presumptions, permitted conviction on showing of mere knowing possession.

On these facts, the Court held first that the defendant's lawful presence on the premises gave him a sufficient interest in the premises to justify his standing to challenge the reasonableness of the search of those premises and to move to suppress the proofs.

Now, this aspect of the Jones case is not involved here because, as everybody is agreed, the petitioners have never asserted an interest in the Knuckles store.

The Court, in Jones, could have stopped there, but it went on and it considered whether independent of Jones' interest in the premises searched, whether he had a sufficient

interest in the property that was seized to justify standing.

Now, it was, of course, the fact that Jones possessed the narcotics that he was accused of possessing, and he possessed them at the time the seizure was made.

And it was apparent, in the Court's view, that had Jones been prepared to come forward and testify as to his possession, at the time of the seizure, he would have had standing under the traditional rule.

The problem was he was not in a position to come forward. He was not willing to come forward to testify. And the reason he was not willing to come forward to testify is because, at that time, there was substantial risk that his testimony as to his possession at the time of the suppression hearing could be used against him in the trial as part of the Government's case in chief.

Because of this dilemma that the defendant was faced with, the Court ruled that he need not make the showing. Where the Government, in its indictment, has already conceded, in effect, that he could make the showing.

There was a corollary rationale that was articulated by the Court, as well. And that is that contrary holding, that is, that Jones must come forward or in practical effect would be unable to come forward, would give the Government the benefit of inconsistent position, because it would be arguing in a sense at the trial that the defendant possessed the

narcotics at the time they were seized. That was the basis of the charge.

While at the suppression hearing, by challenging his standing, they would implicitly be saying that he had no possession at the time of the seizure.

This, the Court viewed is not consonant with the amenities of the administration of criminal justice.

The first thing to be said about Jones in respect of the case here is that unlike Jones the petitioners here have no standing under the traditional standing rule.

As we have discussed, they have no interest in the Knuckles store and, in our view, they have no interest in the property seized.

In our view, the automatic standing rule of Jones was designed solely for those who would otherwise have had standing under the traditional rule, but were unable to assert that standing because of the situation that prevailed at that time with respect to the use of testimony, suppression testimony, at a subsequent trial.

Because Brown and Smith have no standing under the traditional rule, we think that they should not be the beneficiaries of the rule that was designed for those who would have such standing.

Nor does the Jones rationale compel a different -- an extension of the Jones rationale to the -- nor does the Jones

rationale compel an extension of its rule to the facts here.

Since there is no standing under the traditional rule, these defendants were not faced with the dilemma that Jones was faced with. His dilemma arose because the testimony that he would have been prepared to give to establish standing could have been used against him.

Here there is no dilemma because there is no testimony to establish standing and there is no testimony that -- they are not in the position that Jones was in to come forward and establish it.

Q Their attorney says that because they were, quote, partners, and joint venturers, at least if I understand his argument, then Knuckles was the agent of Brown and Smith for Fourth Amendment purposes. At least I think that's what he --

MR. EVANS: I believe that this is in essence decided in Alderman. At least appears to be to me. The ruling stated by Alderman is that co-conspirators are not entitled to assert another co-conspirator's Fourth Amendment rights.

And if that's the argument that's being made, I think it has been answered.

I don't think that there is any precedent for a vicarious assertion of rights, even within a conspiracy, whether you call it a partnership or not.

Q There wasn't any personal property involved in Alderman that was allegedly the joint property of co-conspirators.

MR. EVANS: No. That's right.

Q The question was one of personal privacy --

MR. EVANS: That's right. I think the same principles apply here, nonetheless.

Q There can be a vicarious waiver of Fourth Amendment rights, can't there?

I can't, at the moment, recall the style of the case -- the "duffle bag case" -- Fraser v. Cuff -- where the fellow says, "Sure, you can go ahead and search my duffle bag," and in there he found John Smith's effects. And we said John Smith has no -- John Smith's rights were waived by the owner of the duffle bag.

MR. EVANS: In a sense, John Smith had no rights in the duffle bag. He had his rights -- his rights were in the property that was in the duffle bag.

Q Mr. Evans, what if a man is wearing a stolen overcoat? Let's spin this thing out one more step. Do you think the overcoat can be searched, as in Justice White's analogy, without any other grounds for search, just that since the overcoat is stolen the man has no standing to object to its search?

MR. EVANS: I think not, Mr. Justice, because I think in that instance it would be difficult to argue that his person was not invaded, that his interest in his own person -- I think that's the answer to it.

Q What if there are stolen goods in the pocket?

MR. EVANS: The same answer as I have given to Mr. Justice Rehnquist. I believe that an invasion of what one is wearing, even if what one is wearing is stolen, I would think is an invasion of the person. I would not want to have to argue up here the other side of that issue.

Q But you would argue the opposite?

MR. EVANS: Yes.

Q You might have to argue it in the border search case.

MR. EVANS: That's right.

Q And, wouldn't you also take the position that after they broke in, after they searched Knuckles' place, if they had gone into any of the material that they had found, they might have a problem, but they didn't go into them. Is that right?

MR. EVANS: You mean if they had opened the cartons?

Q No, if they had opened the machines that were in the cartons. But they didn't. They just took the cartons, am I right?

MR. EVANS: It is my understanding that in the cartons were things like men's and ladies' shoes and that kind of thing, but they didn't go in. But I don't think that it --

Q But isn't your point that it wasn't the property of these people, and it does put them in a pretty good dilemma. If they claim that it is their property, they are hung, and if they don't, they are hung.

MR. EVANS: I think not because, as I have indicated, they gave up a possessory interest in the property some two months before the search was made. So even if they were to come forward and make an assertion that they couldn't make, namely, that they did possess it at the time the search was made. I think that the applicable rule in those circumstances would be the Simmons rule which resolves the dilemma in a non-Jones context, namely, the testimony they gave would not be able to be used against them.

That seems to me to be the sensible resolution of the problem.

To summarize the discussion with respect to the dilemma aspect of Jones, as applied here, we think it just does not require -- since there is no dilemma that remains at this point -- there is no need to apply the automatic standing rule on our facts.

Nor, do we think that the alternative rationale of Jones requires an application of its rule on these facts. Because in the circumstances we have here, there is no inconsistency of position that the Government is forced to take.

The Government must show, as part of its case, and did show that Brown and Smith possessed the Central Jobbing Company merchandise at some point, but that possession was two months prior to the time the searchwas made.

The government need not deny at the suppression

hearing that the petitioners were at one time in possession of the merchandise. It is a wholly consistent position.

Its argument really is that at the time of the search there was no possessory interest justifying Fourth Amendment protection.

Or, alternatively, even if there was such a Fourth Amendment interest that deserved protection, or even if there was coincident or contemporaneous possession, the possession was of stolen property, and the possession of stolen property merits no Fourth Amendment protection.

In our view, therefore, there is no reason to apply on these facts a rule that was designed to benefit only those who would have had standing under the traditional rule.

But for a Constitutional dilemma that has been resolved in a different way by Simmons, the petitioners here seek not a resolution of a dilemma that they face, but really a reaping of an unintended and unnecessary windfall.

There is another issue in this case involving a Bruton violation. There was testimony at the trial concerning statements made by both Brown and Smith which were, in some respects, cross-inculpatory.

We concede this was error, but as we detail in our brief, we believe the error was harmless beyond a reasonable doubt. And, unless there are questions, I do not propose to deal with it further at this time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Evans.

Do you have anything further, Mr. Lundy?

MR. LUNDY: No, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:45 o'clock, p.m., the case in the above-entitled matter was submitted.)